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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Case No. 3:23-cv-02880-JSC

Plaintiff,

**ADMINISTRATIVE MOTION TO SEAL  
PORTIONS OF DECLARATION OF  
DENNIS W. CARLTON**

MICROSOFT CORPORATION and  
ACTIVISION BLIZZARD, INC.

Dept.: Courtroom 8—19th Floor  
Judge: Honorable Jacqueline S. Corley

## Defendants

1 Pursuant to Civil Local Rules 7-11 and 79-5(c), Defendants Microsoft Corporation (“Microsoft”)  
 2 and Activision Blizzard, Inc. (“Activision”) respectfully move this Court for an order sealing portions  
 3 of the Declaration of Dennis W. Carlton, dated June 27, 2023 (ECF No. 247) (hereafter, “Carlton  
 4 Declaration”).

5 Below, Microsoft and Activision have identified highly confidential material found in excerpts  
 6 of the Carlton Declaration, along with the specific bases for sealing required under Local Rule 79-5. The  
 7 proposed sealing reflects Defendants’ good-faith efforts to narrowly seek sealing of only that information  
 8 which is competitively sensitive, the public disclosure of which would cause injury to Microsoft or  
 9 Activision that cannot be avoided through any less restrictive alternative means:

10 <b>Document</b>	11 <b>Portions to Be Filed Under Seal</b>	12 <b>Designating Party</b>	13 <b>Basis for Sealing Request<sup>1</sup></b>
14 Carlton 15 Declaration	16 Page 9, entirety of 17 footnote 8	18 Microsoft and 19 Activision	20 This portion contains non-public and 21 highly sensitive information including, 22 but not limited to, business partnerships 23 and negotiations, internal decision- 24 making processes, and investment 25 decisions, which could be used to injure 26 Microsoft and Activision if made 27 publicly available.
28 Carlton Declaration	Page 10, entirety of footnote 12	Activision	This portion contains non-public and highly sensitive information including, but not limited to, internal decision- making processes, market share analyses, and assessment of the competitive landscape, which could be used to injure Activision if made publicly available.
Carlton Declaration	Page 14, portion of paragraph 28 (first redaction)	Microsoft and Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analyses and assessment of the competitive landscape, which could be used to injure Microsoft and Activision if made publicly available.

29  
 28 <sup>1</sup> Legitimate private interests warrant sealing of the Microsoft and Activision information in this chart,  
 29 and the unsealing of the information would result in injury to Microsoft or Activision that cannot be  
 avoided through any less restrictive alternatives.

<b>Document</b>	<b>Portions to Be Filed Under Seal</b>	<b>Designating Party</b>	<b>Basis for Sealing Request<sup>1</sup></b>
Carlton Declaration	Page 14, portion of paragraph 28 (second redaction)	Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analyses and assessment of the competitive landscape, which could be used to injure Activision if made publicly available.
Carlton Declaration	Page 17, portion of paragraph 35	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, financial information and projections, which could be used to injure Microsoft if made publicly available.
Carlton Declaration	Page 17, portions of paragraph 36	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, financial information and projections, which could be used to injure Microsoft if made publicly available.
Carlton Declaration	Page 19, portions of paragraph 44	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, market share analysis, assessment of the competitive landscape, and financial information and projections, which could be used to injure Microsoft if made publicly available.
Carlton Declaration	Page 19, entirety of footnote 32	Microsoft	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, market share analysis, and assessment of the competitive landscape, which could be used to injure Microsoft if made publicly available.
Carlton Declaration	Page 19-21, portions of paragraph 45	Microsoft and Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analysis and data, which could be used to injure Microsoft and Activision if made publicly available.

<b>Document</b>	<b>Portions to Be Filed Under Seal</b>	<b>Designating Party</b>	<b>Basis for Sealing Request<sup>1</sup></b>
Carlton Declaration	Page 20, portion of footnote 34	Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analysis and data, which could be used to injure Activision if made publicly available.
Carlton Declaration	Page 20, entirety of footnote 36	Microsoft and Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analysis and assessment of the competitive landscape, which could be used to injure Microsoft and Activision if made publicly available.
Carlton Declaration	Page 21, portions of footnote 38	Microsoft and Activision	This portion contains non-public and highly sensitive information including, but not limited to, market share analysis and data, which could be used to injure Microsoft and Activision if made publicly available.

## ARGUMENT

## **I. Sealing Portions of the Carlton Declaration Is Warranted Under Ninth Circuit Precedent as It Contains Microsoft and Activision’s Confidential Business Information**

In the Ninth Circuit, “[p]arties seeking to seal judicial records relating to motions that are ‘more than tangentially related to the underlying cause of action,’ bear the burden of overcoming the presumption with ‘compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.’” *Lenovo (United States) Inc. v. IPCom GmbH & Co., KG*, 2022 WL 2313948, at \*1 (N.D. Cal. Jun. 28, 2022); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“[T]he court must ‘conscientiously [] balance the competing interests’ of the public and the party who seeks to keep certain judicial records secret.’”). Courts in this Circuit regularly find that sealing is warranted where the records or information that are sought to be sealed could be used “as sources of business information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978); *see also In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2008) (same); *Velasco v. Chrysler Grp. LLC*, 2017 WL

1 445241, at \*2 (C.D. Cal. Jan. 30, 2017) (stating that “district courts in this Circuit have sealed records  
 2 containing ‘information about proprietary business operations, a company’s business mode or  
 3 agreements with clients,’ [and] ‘internal policies and strategies’”) (internal citations omitted).

4 “The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh the  
 5 public’s interest in disclosure and justify sealing court records exist when such court files might have  
 6 become a vehicle for improper purposes, such as the use of records to . . . release trade secrets.’” *Velasco*,  
 7 2017 WL 445241, at \*2 (quoting *Elec. Arts*, 298 F. App’x at 569); *see also* *Elec. Arts*, 298 F. App’x at  
 8 569 (“A ‘trade secret may consist of any formula, pattern, device or compilation of information which  
 9 is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors  
 10 who do not know or use it.’”) (citation omitted). A court has “broad latitude” to grant protective orders  
 11 to prevent disclosure of “many types of information, including, but not limited to, trade secrets or other  
 12 confidential research, development, or commercial information.” *Phillips ex rel. Estates of Byrd v. Gen.*  
 13 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

14 In determining whether a document should be filed under seal, courts consider, among other  
 15 things, the measures taken to guard the information’s secrecy and the value of the information to the  
 16 business or its competitors. *E.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,  
 17 1212 (9th Cir. 2002). Here, Microsoft and Activision seek to seal narrowly tailored excerpts of the  
 18 Carlton Declaration that reference and reflect, among other things, confidential, proprietary information  
 19 relating to Defendants’ internal decision-making processes, investment decisions, strategic evaluation of  
 20 forward-looking opportunities, market share analyses, assessments of the competitive landscape,  
 21 business partnerships, terms of existing confidential agreements, revenue figures and projections, and  
 22 internal discussions of business strategy. The disclosure of this information could be used to injure  
 23 Microsoft and Activision if made publicly available.

24 **II. Sealing Portions of the Carlton Declaration Is Necessary to Protect Microsoft and  
 25 Activision’s Confidential and Proprietary Business Information**

26 Microsoft and Activision seek to maintain under seal portions of the Carlton Declaration, as they  
 27 contain Microsoft and Activision’s non-public and highly sensitive information from documents  
 28 obtained during the course of the FTC’s investigation and during litigation discovery. Examples of such

1 confidential information include, but are not limited to, Defendants' internal decision-making processes,  
 2 investment decisions, strategic evaluation of forward-looking opportunities, market share analyses,  
 3 assessments of the competitive landscape, business partnerships, terms of existing confidential  
 4 agreements, revenue figures and projections, and internal discussions of business strategy. Disclosure  
 5 of this information would provide Microsoft and/or Activision's competitors with private data about  
 6 Microsoft and Activision's performance and business strategy, which could harm Microsoft and  
 7 Activision's competitive standing. *See Cont'l Auto. Sys. v. Avanci, LLC*, 2019 WL 6612012, at \*4 (N.D.  
 8 Cal. Dec. 5, 2019). Thus, the unsealing of this highly confidential and sensitive information would cause  
 9 injury to Microsoft and/or Activision that cannot be avoided through less restrictive alternatives.

10 Finally, Microsoft and Activision provided the FTC with the confidential business information  
 11 cited in the Carlton Declaration pursuant to the statutory and regulatory guarantees of confidentiality  
 12 contained in the Hart-Scott-Rodino Act or the FTC Act. *See* 15 U.S.C. §§ 18a(h), 46(f), 57b-2(b), 57b-  
 13 2(c); 6 C.F.R. § 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to maintain the  
 14 confidentiality of a party's confidential business information that has been provided to the FTC via a  
 15 regulatory request. *See, e.g., FTC v. Lockheed Martin Corp.*, 2022 WL 1446650, at \*2 (D.D.C. Jan. 25,  
 16 2022) ("According to the FTC, sealing the complaint is appropriate . . . because the filing includes  
 17 confidential information submitted . . . pursuant to 'statutory and regulatory guarantees of  
 18 confidentiality.' . . . The requested sealing covers only confidential information and is, according to the  
 19 FTC, required by regulation.").

20 **III. Conclusion**

21 As stated above, compelling reasons justify Defendants' requests for sealing the confidential  
 22 business information contained in the Carlton Declaration. Microsoft and Activision respectfully request  
 23 that this Court grant this Administrative Motion with respect to the confidential excerpts of the Carlton  
 24 Declaration noted herein. In accordance with Civil Local Rule 7-11, Defendants have filed a Proposed  
 25 Order herewith.

1 Dated: July 3, 2023

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